



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

October 29, 2009

District Engineer  
U.S Army Corps of Engineers, Mobile  
Regulatory Division, Inland Branch  
Attn: Sheri Zettle  
P.O. Box 2288  
Mobile, Alabama 36628-0001

Subject: Stockton at Highway 59, LLC, SAM-2009-1111-SMZ

Dear Ms. Zettle:

The U.S. Environmental Protection Agency, Region 4 (EPA), has reviewed the Public Notice Number SAM-2009-1111-SMZ (PN) relating to an application for permit to construct four recreational lakes, submitted by Stockton at Highway 59, LLC. The project proposal describes impacts to 121.8 acres of wetlands and 13,557 feet of intermittent and perennial streams. Two of these lakes would be constructed on unnamed tributaries to Aiken Creek, one lake would be constructed on Flat Creek, and the fourth lake would be constructed on an unnamed tributary to Rains Creek, all of which drain to the Tensaw River. The proposed project site is near Stockton, Baldwin County, Alabama.

EPA has reviewed the information on this project contained in the PN, as well as documentation of the project location characteristics from a site visit conducted September 29, 2009, by representatives of U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service, Alabama Department of Conservation and Natural Resources, Alabama Department of Environmental Management (ADEM), and Barry A. Vittor and Associates, the latter having prepared Wetland Rapid Assessment Procedure (WRAP) assessments of the site for the applicant. This letter summarizes EPA's position on this project, concentrating specifically on Section 404 (b)(1) Guidelines (Guidelines), and the implementing regulation, 40 CFR Part 230, which prohibit avoidable or significant adverse impacts to the aquatic environment.

The WRAP assessments originally prepared by an agent of Barry A. Vittor and Associates for the applicant indicated that the wetlands at several of the sites were of low to medium quality. However, the federal and state agencies that conducted the September 29, 2009, site visit came to the general consensus that the wetlands are in fact high quality bottomland hardwoods. The agent agreed with this conclusion at the site visit and has offered to revise the assessments. WRAP assessments later conducted by USACE confirmed this, with WRAP scores of 88 percent or better for all eight sites evaluated. EPA considers the large tracts of bottomland hardwood forested wetlands and their associated drainage features to

be aquatic resources of national importance (ARNI). The watersheds in this project area provide important water quality and wildlife benefits.

Section 230.10(a) of the Guidelines states that no discharge of dredge and/or fill material into waters of the United States, including wetlands, shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic environment, provided the alternative does not have other significant adverse environmental consequences. Three of the recreational lakes described in this PN are proposed to provide recreational fishing on a club membership basis; the fourth would be managed as a recreational retreat. The applicant describes three alternatives that were considered concerning avoidance and minimization to waters of the United States. In addition to the currently proposed project, one alternative is a plan for construction of six lakes; the other is a no-action alternative. In order to fully review the proposed project, EPA requests that the applicant provide information on practicable alternative approaches that serve the purpose of providing recreational fishing and recreational retreat without the creation of lakes, as well as practicable alternative site locations that would have less adverse impact on the aquatic environment. EPA requests that the applicant provide this office with the following information:

- a. descriptions of alternative approaches that would serve the purpose of providing recreational fishing and recreational retreat without creation of lakes;
- b. site descriptions for alternative sites considered, including the presence, quantity, and quality of wetlands;
- c. availability for purchase of alternative sites, and a determination of whether the proposed cost is reasonable;
- d. the presence or absence of any federally listed plant or animal species and/or historical properties;
- e. rationale for size and depth of recreational lakes;
- f. rationale for project purpose – need for sports fishery and retreat lakes in the context of availability of high-quality fisheries throughout the southern part of Alabama; and
- g. clarification of project purpose – overall development plans for total project area, including housing or other constructed development, road system, and parking.

The Code of Federal Regulations, 40 CFR. § 230.10(b)(1), further states that no permit may cause or contribute to violations of any applicable State water quality standards. Flat Creek, on which proposed Lake Three would be constructed, is listed as impaired on ADEM's 2008 303(d) list for ammonia and nutrients. Construction of a dam, as well as additional human activity that would result from the altered land use by the proposed project, would likely result in additional loading of nutrients to this impaired water body. This would contribute to violations of the applicable water quality standard, which is not permissible under 40 CFR §230.10(b)(1). In addition, all of the water bodies with the proposed impacts are tributaries directly or indirectly to the Tensaw River, which is listed for mercury as impaired on ADEM's 2008 303(d) list. Reservoirs and their releases significantly modify the water quantity and quality downstream. Changes include duration, amplitude and frequency of water delivery downstream that can eliminate the designated and existing uses of waters of the United States. The changes in water delivery downstream can significantly change the chemical, physical, and biological integrity of the downstream waters. Temperature, total suspended solids, nutrients, and total dissolved solids

can be changed to the point they no longer support the designated and existing uses of these waters. EPA, therefore, requests that the applicant provide:

- a. calculations to show the change in water quantity and quality discharge characteristics of the streams that would be impacted by reservoir construction;
- b. detailed flow characteristics associated with the outfalls to show if the existing uses downstream would be maintained;
- c. water quality data from the reaches that would be directly impacted and downstream of the proposed impoundments; and
- d. water quality data from a minimum of two existing impoundments that are similar to the project being proposed, to evaluate the potential for degradation of water quality.


Section 230.10(d) of the Guidelines prohibits issuance of a permit to fill aquatic resources “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.” Specifically, no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. This regulation restates the need for a thorough alternatives analysis that not only looks at the available property, but also at the practicable alternatives to the site design and construction. Further information is requested as described above so that EPA can fully evaluate avoidance and minimization of wetland and stream impacts of the proposed project.

According to the PN, the applicant’s proposed mitigation for the project impacts is described as: “Partial mitigation for impacts to 121.8 acres of low-to-high quality forested and scrub/shrub wetlands would be accomplished on site through restoration, enhancement, and preservation of wetlands. Wetland mitigation that cannot be accomplished on site would be accomplished through the purchase of credits in an approved off-site wetland mitigation bank. Mitigation for impacts to 13,557 linear feet of intermittent and perennial streams would be accomplished on site.” Since avoidance and minimization have not been adequately demonstrated, it is premature for EPA to consider any type of mitigation plan. However, if on-site compensatory mitigation is to be used, the applicant will need to use revised characterization of the quality of the wetlands (as agreed by the agencies and applicant’s agent at the September 29, 2009, site visit), and the applicant will need to demonstrate an appropriate level of compensatory mitigation. EPA anticipates that additional compensatory mitigation may be required to achieve “no net loss” of pre-project on-site wetland functions. Once sufficient information is available to determine whether the project alternatives, then avoidance, then minimization components comply with the Guidelines, we welcome the opportunity to further discuss appropriate compensatory mitigation for this project.

Based on the above observations, EPA has determined that the project, as currently proposed, does not comply with the Guidelines. EPA finds this project may have substantial and unacceptable adverse impacts on ARNI. Therefore, we recommend denial of the project, as currently proposed. This letter follows the field level procedures outlined in the August 1992 Memorandum of Agreement between the EPA and the Department of the Army, Part IV, paragraph 3(a) regarding Section 404(q) of the Clean Water Act.

Thank you for the opportunity to comment on this PN. If you have any questions regarding these comments, please contact Rosemary Hall (Hall.Rosemary@epa.gov or 404-562-9846) or Jennifer Derby (Derby.Jennifer@epa.gov or 404-562-9401).

Sincerely,



James D. Giattina  
Director  
Water Protection Division

cc: ADEM, Mobile, AL